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IN THE COURT OF APPEALS OF INDIANA

MARK G. MCQUEARY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A01-0603-CR-103
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
Cause No. 73D01-0110-CF-69

September 7, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Mark G. McQueary ("McQueary") challenges the thirty-five-year sentence imposed upon him following his plea of guilty to Dealing Methamphetamine, a Class A felony.[1] We affirm.

Issue

McQueary presents a single issue for review: whether the trial court erred in sentencing him to thirty-five years imprisonment.

Facts and Procedural History

On October 11, 2001, Shelbyville Police Detective Robert Brinkman received a complaint about drug sales at 835 South Tompkins Street in Shelbyville, a residence shared by McQueary, three other adults, and two children. A day care center was operated from the residence during daytime hours, and it was located within 1000 feet of a youth program center.

Detective Brinkman arranged for a confidential informant to purchase "crank" from McQueary. (App. 90.) In exchange for $25.00, McQueary gave the confidential informant approximately .04 grams of "crank." The "crank" was tested and found to contain methamphetamines.

On October 13, 2001, a search warrant was executed at 835 South Tompkins Street. The search yielded methamphetamine divided into one-gram packages, a plastic bag containing 17 grams of marijuana, and drug paraphernalia. McQueary was arrested and charged with two counts of dealing methamphetamine, two counts of possession of

methamphetamine,[2] dealing a schedule IV controlled substance,[3] possession of a controlled substance,[4] possession of marijuana,[5] possession of paraphernalia,[6] maintaining a common nuisance,[7] and possession of marijuana with a prior conviction.[8] The State also alleged that McQueary is a habitual substance offender.[9]

On February 26, 2002, McQueary pled guilty to one count of dealing methamphetamines, and the remaining charges were dismissed. On March 21, 2002, McQueary was sentenced to thirty-five years imprisonment. On January 20, 2006, McQueary filed a motion for permission to file a belated notice of appeal. The motion was granted on February 10, 2006.

Discussion and Decision

At the time McQueary was sentenced, Indiana Code Section 35-50-2-4 provided that a person who committed a Class A felony should be imprisoned for a fixed term of thirty years, with not more than twenty years added for aggravating circumstances and not more than ten years subtracted for mitigating circumstances. In sentencing McQueary to five years above

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[1] Ind. Code § 35-48-4-1.
[2] Ind. Code § 35-48-4-6.

[3] Ind. Code § 35-48-4-3.

[4] Ind. Code § 35-48-4-7.

[5] Ind. Code § 35-48-4-11.

[6] Ind. Code § 35-48-4-8.3.

[7] Ind. Code § 35-48-4-13.

[8] Ind. Code § 35-48-4-11.

[9] Ind. Code § 35-50-2-10.

the presumptive term, the trial court found three aggravating circumstances: (1) McQueary was released on bond for another offense when he committed the instant offense, (2) children were present in the home when he committed the instant offense, and (3) McQueary had a history of criminal and delinquent activity. The trial court found two mitigating circumstances: (1) McQueary pled guilty, and (2) he grew up in an abusive family environment.

On appeal, McQueary contends that the trial court gave too much weight to his history of misdemeanor offenses, and inadequate weight to his guilty plea. He also claims that the trial court overlooked mitigating evidence, i.e., that he has significant health problems.

Criminal History

In Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court confronted the issue of whether a defendant's criminal record, standing alone, is a sufficient aggravator to support any enhancement above the presumptive term. In addressing this issue, the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. The Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id. While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the Morgan Court cautioned

sentencing and appellate judges to think about the appropriate weight that should be given a defendant's history of prior convictions. Id. The Morgan Court noted that the defendant's prior Class B conviction for delivering a controlled substance was certainly worthy of some weight because of its similarity and proximity to the offense at issue, i.e., possession of methamphetamine as a Class A felony. Id. at 16. However, in light of the five mitigating factors found by the trial court, the Morgan Court determined that the defendant's criminal record, standing on its own, would not support the imposition of the enhanced sentence. Id. Ultimately, after determining that two of the four aggravators used to enhance the defendant's sentence were improper and concluding that the aggravating and mitigating circumstances were in equipoise, the Morgan Court directed the trial court to revise the sentence at issue to the presumptive term. Id. at 18.

With respect to McQueary's criminal history, he was convicted in 1998 of two counts of dealing in marijuana. In 1999, he was convicted of two counts of operating a vehicle while intoxicated and one count of possession of marijuana. At the time he committed the instant offense, he had pending charges of possession of marijuana, public intoxication, and possession of paraphernalia. This history of multiple offenses involving abuse of substances is worthy of sentencing weight. Moreover, unlike the circumstances in Morgan, other unchallenged aggravators were present in this case.

Mitigators

The trial court is not obligated to accord the same weight to a factor that the defendant considers mitigating or to find mitigators simply because they are urged by the defendant.

Klein v. State, 698 N.E.2d 296, 300 (Ind. 1998). Rather, it is within the trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to the identified circumstances. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999), reh'g denied. Moreover, the trial court is not required to explain why it did not find a certain factor to be significantly mitigating for leniency in sentencing. Dunlop v. State, 724 N.E.2d 592, 594 (Ind. 2000), reh'g denied.

Here, the trial court recognized that McQueary's decision to plead guilty was a mitigating circumstance. However, the trial court noted that the mitigating value was "tempered by the fact that it was done on the eve of trial." (Tr. 76.) Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances because it saves judicial resources and spares the victim from a lengthy trial. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165.

The record herein demonstrates that McQueary entered a guilty plea after the State had gathered its evidence, potential jurors were summoned, and the parties appeared for trial. Moreover, several charges against McQueary were dismissed in exchange for his plea of guilty to the remaining charge. Because the benefit to the State from McQueary's guilty plea was marginal, at best, the trial court did not err by failing to accord McQueary a more substantial benefit in sentencing.

Concerning McQueary's health as a mitigating factor, we note that an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Although McQueary testified at the sentencing hearing that he had thyroid problems and had undergone heart surgeries, he did not explain how such conditions should mitigate his responsibility for his crime. See Henderson v. State, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (finding no abuse of discretion in the trial court's failure to find poor health to be a mitigating factor, where the defendant was able to take medication and did not demonstrate that her illnesses were untreatable during incarceration).

In light of the foregoing, McQueary has shown no abuse of discretion in the trial court's weighing of aggravating and mitigating factors.

Appellate Rule 7(B) Review

McQueary also requests that we revise his sentence in accordance with Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

The character of the offender is such that prior attempts at rehabilitation had failed. Indeed, he committed the instant offense while released on bond. Concerning the nature of the instant offense, we observe that the sale took place with children present. We cannot say that the thirty-five year sentence, a sentence of five years beyond the presumptive term, is

inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

McQueary has not demonstrated that the trial court erred in imposing sentence upon him or that his sentence is inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.